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IN THE

Supreme Court of the United States

October Term, 1957

No. 1088 / 92

A. LINCOLN GREEN, *Petitioner*,

v.

J. STANLEY BAUGHMAN, President, Federal National Mortgage Association, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

A. LINCOLN GREEN,
Petitioner pro se

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

A. Lincoln Green prays that a writ of certiorari issue to review the judgments of the Court of Appeals for the District of Columbia Circuit, entered January 12, 1956 and January 31, 1957.

OPINIONS BELOW

The first opinion of the Court of Appeals (App. p. 1a) is reported at 229 F. 2d 33, 97 App. D.C. 150. The second opinion (App. p. 4a) has not been officially reported.

The opinion of the District Court (J.A. 9)* granting summary judgment in favor of petitioner is not officially reported. The District Court wrote no opinion with respect to its second order granting summary judgment in favor of the respondents.

JURISDICTION

The judgments of the Court of Appeals were entered January 12, 1956 and January 31, 1957. Rehearing by the Court of Appeals sitting en banc was denied March 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Is a judgment on the merits valid in an action for wrongful dismissal where the court finds that a person who is not a defendant made the dismissal?

2. Is a decision of dismissal void for lack of authority and jurisdiction where the administrative officer's authority to employ and dismiss is limited to employees in grade GS 12 and below and petitioner was in grade GS 13?

3. Respondent, the administrative head of the agency, was named in the charges to receive the petitioner's answering affidavit. He signed the statement of charges and the decision. Three and a half years later the chairman asserted in an affidavit that the decision was his. Was the court below correct in ruling that the chairman had made the decision and was accountable in this action for it?

4. Are respondents estopped from showing that the chairman made the decision when they did not disclose the alleged facts for three and a half years and obtained deci-

* There are two joint appendices in the Court of Appeals, No. 12717 and No. 13500. References without the appeal number are to the joint appendix in No. 12717, which was used on both appeals.

sions and judgments on the ground that respondent, Baughman, had made the decision?

5. Is a decision consisting of four words, "the charges are sustained," a compliance with a statute requiring "reasons given in writing."

6. Respondent, Baughman, based his action on information in statements and conversations with employees, held after petitioner had submitted his answer. Can the respondent consider information outside the charges, which the employee had no opportunity to answer?

7. Are the charges stated specifically and in detail where they consist of allegations of the commission of unknown quantities of offenses without dates, details or names?

8. Was the chairman an administrative officer to make the decision where the by-laws provide that "the President shall be the chief executive officer" and "shall carry out and direct the business and affairs of the Association, subject to the general supervision of the chairman?

9. Where the statute prescribes a decision, is a recommendation and decision a compliance with the statute?

10. Is the dismissal of an attorney on charges, based on the uncorroborated statement of a girl of nineteen who alleged offenses committed over a period of sixteen months but had never complained until after her promotion by respondent, arbitrary, capricious and unreasonable?

11. Are arbitrary and capricious action, bias and prejudice, bad faith and sham proceedings, and undue influence and coercion, grounds for setting aside an administrative decision of dismissal?

STATUTES AND REGULATIONS INVOLVED

Sec. 14, Veterans Preference Act, 5 U.S.C., sec. 863.

Sec. 652(a), Lloyd-LaFollette Act, 5 U.S.C. 652(a).

Regulations of the Civil Service Commission.

5 CFR, sec. 9102(1).

5 CFR, sec. 22.3.

S1-28, Federal Personnel Manual, Civil Service Commission.

STATEMENT OF THE CASE

a. The Petitioner

Petitioner is an attorney, admitted to practice in 1924, and a disabled veteran, retired for disabilities in line of duty because of heart disease and hypertrophic arthritis of the lumbar spine, progressive, incurred after an injury to his spine on maneuvers. The following is a letter from his commanding officer:

"ARMY SERVICE FORCES
SAN FRANCISCO PORT OF EMBARKATION
FORT MASON, CALIFORNIA

19 July 1944

In Reply refer to:

To Whom It May Concern:

Captain A. Lincoln Green has been a member of my staff for the past five or six months. During that time, I have had opportunities to make a thorough appraisal of his ability. I have found him a careful, studious lawyer with a comprehensive grasp of his profession and a keen zeal for careful research and study. He is mature and his judgment is excellent. If I had an office in civil life, I would be delighted to have him associated with me. From my observation, I believe that he has a good knowledge of Corporation, Real Estate and Ad-

miralty Law. I shall be glad to answer any communications regarding Captain Green.

(signed) A. N. ZIEGLER
A. N. ZIEGLER
Colonel, J.A.G.D.,
Staff Judge Advocate."

Petitioner also served in the First World War with the company that was the first to leave for France and the first to sustain casualties. He is a member of the Association of the Bar of the City of New York, the Foreign Policy Association, the American Academy of Political Science, the American Society of International Law, and the Disabled American Veterans. He was assistant-counsel to the Ambulance Chasing Investigation in New York, Technical Advisor to the New York Constitutional Convention Committee and wrote that part of its publications entitled "The Pardoning Powers of the Governor."

Petitioner received an "excellent" efficiency rating except in one year when he received "very good" in a new position and except in 1952 when he received "satisfactory" under the law reducing the ratings to three, outstanding, satisfactory, and unsatisfactory. At the date of his dismissal he was in grade GS 13, earning $9,160.00 per year and had had more than fourteen years service.

b. The Administrative Proceedings

On July 14, 1952 general counsel handed petitioner a statement of charges, signed by respondent, Baughman, alleging under five titles the commission of unknown quantities of offenses over a period of twenty months without dates or details or specific offenses.

The charges under "1(a)" of the first title, "Improper Conduct toward Office Personnel," allege that petitioner was "at times rude and discourteous and used severe language" to his first stenographer and on one occasion "used

abusive language. These offenses, without the date or details of a specific act are alleged to have occurred during a period a year and a half before the charges were served.

The remaining charges are taken from the statement of a girl of nineteen who had been promoted by respondent before he obtained it. She had told her father and mother that she would give up her position before signing a statement. (J.A. 77). Prior to her promotion she had never complained during the entire period of sixteen months covered by the charges.

The charges under "1(b)" of the first title allege that petitioner's attitude toward his second stenographer was "on numerous occasions distasteful and unpleasant, insulting, rude, harsh, and abrupt," that on two occasions petitioner "became so enraged that you threw a small telephone book toward her and hit her desk," and on occasions said to her, "You come over here and you come fast," that he called his co-workers during this period ignoramus and imbecile. (J.A. 40). All this is charged without the date or details of a definite act or offense, without the names of co-workers. Nor does the information appear in the statements of the employees (J.A. 250, 270-278) upon which respondent says "The charges were based entirely." (J.A. 256).

The charges under the second title, Improper Use of Government Office and Property, allege the use over a period of twenty months of "the office and its miscellaneous equipment, including telephones, typewriters, file folders, stationery, filing cabinets, and other supplies and equipment, by making and receiving numerous telephone calls concerning your personal business; and by requiring your stenographer to type personal letters for you to keep personal books and records for you, and to make personal telephone calls for you." (J.A. 41).

The fact that petitioner was having his home built under the G.I. Bill during part of this period furnished the basis

for these charges. "Equipment" is mentioned twice and the telephone, three times. The personal work and telephone calls are not set forth, although the first is recorded in the stenographer's shorthand books and all telephone calls pass through the government operator. What use petitioner made of "cabinets" other than to hold one thin personal file is not stated. It is difficult to determine the nature of the offenses and the standards for their commission.

The charges under the third title, "Improper Use of Government Personnel," duplicate those under the second. It is charged that "the improper use of the stenographer . . . required her to devote practically three-fourths of her time to your personal work, leaving only approximately one-fourth of her time available for her government duties." (J.A. 42). This over a period of sixteen months. The charges do not give details showing how a supervised employee perpetrates this abuse.

The charges under the fourth and fifth titles have been held insufficient by the Commission. Though not in issue, those under the fifth title (J.A. 43) are significant. Petitioner is charged with an argumentative attitude and unwillingness to make changes in his letters and opinions.

Petitioner had refused to write a memorandum recommending $5,000.00 in settlement of a claim by an attorney. He had arrived at a figure of $3,500.00, based on averaging the estimates of three attorneys. (J.A. 131). Another attorney wrote the desired memorandum for the file, which general counsel signed. General Counsel arrives at the figure of $5,000.00 by accepting the highest of the three estimates "in the interests of liberality." (J.A. 135). The memorandum bears the same date as petitioner's but was written later, as it shows on its face.

On April 3, 1952 petitioner had drafted a letter holding that mortgages on leaseholds were purchasable in accord-

ance with the express language of the statute (J.A. 139). Some weeks later general counsel told petitioner to draft a letter holding that they were not purchasable but pointed to no error in petitioner's original opinion. Petitioner reluctantly collaborated in drafting the letter. (J.A. 140).

In September, 1951, general counsel had signed a letter drafted by petitioner holding that a deposit of $625.00 was not returnable. In April, 1952 he asked petitioner to draft a letter justifying the return. Petitioner reluctantly complied. (J.A. 109).

After these and similar incidents respondent offered petitioner an administrative position, saying that petitioner was not very busy at the law. Respondent had discussed this plan for removing petitioner from the legal division with general counsel. Petitioner pointed to the recent employment of an attorney by respondent to explain why he was not very busy and refused to leave his position for respondent's recent appointee, saying that he was a lawyer and preferred the law. Respondent said:

> "All right, no hard feelings. People generally prefer the administrative side and I thought you would." (J.A. 100).

Respondent shortly thereafter, promoted petitioner's stenographer, a girl of nineteen (J.A. 206). She signed a statement. On July 7th, two weeks after, general counsel phoned petitioner, "Can you step in here for a minute, Abe?" Respondent was present. General counsel said:

> "We want you to get another job. I don't think you have been very happy here." (J.A. 37).

A draft of the charges was then on his desk. General counsel asked whether petitioner had any interviews scheduled, saying that petitioner's supervisor had obtained a position at a higher grade. When petitioner said that he had not, general counsel said:

"If you don't get another job, charges will be preferred." (J.A. 37)

Petitioner said that he was not aware of anything he had done to warrant charges and asked how he could obtain another position if charges were contemplated. General counsel said:

"That can be arranged." (J.A. 37).

General counsel then read some of the charges. When the charge of the use of government stationery was read, respondent exclaimed, "Government paper!" Petitioner, the stenographer, afterwards admitted, used his own stationery. (J.A. 254).

Respondent said that petitioner viewed matters from the legal point, that he stayed in his room though sociable at parties. General counsel said that he had noted this last characteristic. Respondent pressed petitioner to consider changing his position. The conference ended with general counsel saying that there would be another and that in the meantime "we would both think matters over." (J.A. 51).

On July 11th, four days after this conference, general counsel signed a statement in which he said:

"Accordingly I must state my belief to be that his removal will be for the best interests of the Association." (J.A. 275).

This was one of the statements upon which respondent's determination "was based." (J.A. 203). General counsel had no knowledge of any offenses except from a reading of the stenographer's statement. (J.A. 206, 207, 210).

On July 14th the second conference was held. Petitioner was then under medical care. (J.A. 51). Petitioner said that if there had been anything in his conduct that general counsel disapproved, he would remedy it; that if he had been too persistent in maintaining his legal position, he

would no longer do so. General counsel replied that the situation had gotten beyond this, that matters had come to their attention that were serious. He then read the charge under the first title. When petitioner denied them, general counsel said:

> "What puzzles me is this. Why should she say these things if they aren't true." (J.A. 52).

Respondent said that petitioner had no cause to worry over his condition if he was innocent. At another point he said that petitioner could resign and thus avoid a trial. (J.A. 51).

General counsel handed petitioner the charges, signed by respondent. Petitioner asked who would preside at the hearing, believing then he was entitled to a hearing. General counsel answered, "Mr. Baughman." Petitioner asked for charges "specifically and in detail" pointing out the insufficiency of those served, and asked that respondent disqualify himself for bias, prejudice and interest:

> "You ordered or approved an investigation when the matters set forth in the statement of charges had never been the subject of complaint or warning. For what purpose, if not to form the basis for charges that would force me out of my job? You took an active part in the discussions of July 7 and July 14 when I made my denials and produced evidence of the untruthfulness of some of the charges. If you did not believe those denials then, you will not believe them at the trial. In signing this statement of charges you showed a ready willingness to sign charges which on their face are incredible. You gave me the alternative of resignation to escape trial. It is the prosecutor who, being convinced of the guilt of the accused, offers the accused the chance to take a lesser plea. Every single act of yours has been an act of ready willingness to believe in the guilt of a lawyer of almost 30 years standing at the bar. When your Chief Legal Advisor asked me the rhetorical question why this girl would make the alleged statements if they weren't true, you made no objection to the assumption of guilt, to the

unfairness of placing upon me the burden of explaining the mental reactions and reasonings of a girl of 19 while under the control of your investigator. Indeed, there is no element of justice in this proceeding in which you have taken an active part. There are matters in issue in which you are an interested party." (J.A: 59):

On September 19, 1952 petitioner was handed the decision, signed by respondent, reading:

"I am authorized to notify you that the decision is that the charges are sustained . . . ." (J.A. 142).

Petitioner appealed "from the decision of J. Stanley Baughman discharging him from his position . . . ." (J.A: 144)

Respondent, four days before on September 15, 1925, had made a recommendation and put the decision up to the Chairman of the Board of the corporate agency:

"The following resume and analysis thereof, together with my findings and my recommendation, are presented for your consideration and decision" (J.A. 257).

Recommendations

Based on my findings I recommend that Mr. A. Lincoln Green be discharged . . . and that a letter of notification be sent Mr. Green substantially in the form of the attached.

J. S. Baughman, President

Approved:

Raymond M. Foley,
Chairman of the Board. (J.A. 270)

Respondent treated the charges as allegations to be proved by specific information outside the charges. This information he obtained from the statements of the em-

ployees and from conversations with them after petitioner had answered the charges:

> ". . . my recommendation for Mr. Green's discharge was based upon the statements of the employees after a personal interview with each and everyone of them, and upon Mr. Green's failure to overcome the statements of the employees in his answer." (J.A. 203).

> "After the answer in this matter had been filed, in considering the evidence in support of the Statement of Charges, I not only carefully reviewed the written statements of the witnesses, but I also orally interviewed the witnesses themselves." (J.A. 256).

Respondent had five statements of employees upon which he says he based his decision, but the only one that is material is that of the second stenographer whom he had promoted prior to obtaining her statement.

The first stenographer had refused to sign the statement prepared for her but had executed an affidavit, attached to petitioner's answering affidavit, saying that petitioner "did not use abusive language," that his words were, "Haven't I told you to bring your book when I buzz for you. I don't want to have to tell you again." (J.A. 115). When respondent learned of this he had a talk with her. She then confirmed the charges which she had first refused to confirm:

> "After Mr. Green had filed his answer, I talked to Mrs. Smith and she stated that all facts related in her original unsigned statement were true." (J.A. 258).

The administrative judge also talked with the other employees "to determine whether . . . they would be willing to stand back of their statements if they were called upon to do so." They said "they would stand back of their statements given." (J.A. 205). Petitioner asked for their presence at the Commission's hearing. None appeared.

The second statement was that of general counsel but he knew nothing of the offenses. The charges in "1(a)"

allege that the first stenographer had complained to him of the use of abusive language and that he had warned petitioner. But when the Commission's investigator asked for precise language general counsel said:

> "I do not recall that she stated the precise language that Mr. Green had used on any of these occasions." (J.A. 205).

The third statement is by the attorney who had been recently appointed by respondent and shared the room with petitioner and the second stenographer for a few months. It contains the familiar characterizations but no corroboration of the discourteous remarks quoted or of her statement that petitioner had called him an imbecile. (J.A. 276).

The fourth statement is by petitioner's supervisor. (J.A. 278). Respondent and general counsel obtained his statement but refrained from eliciting a scintilla on the charges in issue. Yet it is to him that one turns for authoritative information on the charges. He has a duty to supervise.

The second stenographer alleges that petitioner called an attorney imbecile. Respondent enlarges the charge to include ignoramus, co-workers, and a period of sixteen months.

General counsel says:

> "Never in my presence did Mr. Green call any of the lawyers in the office by the names of 'ignoramus' or 'imbecile.'" (J.A. 207).

Petitioner's supervisor says:

> "I never heard Mr. Green use the epithet 'imbecile' or ignoramus' to anybody . . ." (J.A. 218).

Another attorney said:

> "He never called me an ignoramus or imbecile." (J.A. 221).

The stenographer alleges that petitioner used three-fourths of her time on personal work for a modest six or seven months. (J.A. 251). Respondent enlarges the charge to cover sixteen months. She reduces it, when questioned by the Commission's investigator, to one month. (J.A. 236).

The first stenographer refused to sign a statement and even this unsigned statement contained no accusation of the use of abusive language. Nevertheless, respondent charges petitioner with the use of abusive language. Respondent says that "the charges were carefully drawn . . . and based entirely on the statements of the witnesses." (J.A. 256).

The charge alleges that petitioner became enraged and threw a small telephone book toward her twice. Questioned by the Commission's investigator, it was once. Petitioner was "very angry." The "throwing" was accompanied by a request to look up a number herself. The telephone book that was thrown is identified as the RFC telephone book, the inter-office directory of a few sheets of paper (J.A. 233).

There was available to respondent the testimony of two eye-witnesses, his own two assistants who were in the room with petitioner and the stenographer for a time. They stated under oath to the Commission's investigator:

> "I did not observe any discourtesies on Mr. A. L. Green's part either toward his stenographer or other members of the Legal Staff, although it did appear that his relationship with other attorneys of the Legal Branch was not entirely congruent." (J.A. 240).
>
> "With reference to improper conduct toward office personnel—during these six one week periods that I was in the office at all, I didn't see any indication of mishandling or mismanagement as far as he was concerned with the girl . . . ." (J.A. 242).

Three other employees with whom petitioner had had contacts in the course of his duties also stated to the Commission's investigator:

A Mr. Philip Sadoti said:

"Mr. Green would seek my advice during these contacts. In my meetings Mr. Green would accept the advice without dissenting comment. My limited contacts with Mr. Green were all conducted on a pleasant basis . . . ." (J.A. 250).

A Miss Mary L. Smith said:

"I worked in the room next to Mr. Green's room. Occasionally I took dictation from Mr. Green. He was nice to me, as he was glad to get someone to take his work. He always treated me all right. I would go in and take the work and go ahead. During the few instances I took some work from Mr. Green there was no indication of discourtesy." (J.A. 246).

A Mr. Allan C. Tyler said:

"In my limited business dealings with him I experienced no rudeness or discourtesy from Mr. Green. My remaining contacts with Mr. Green were limited to going out to lunch with him and driving home on a few occasions during which matters of general interest were discussed, all of which were pleasant." (J.A. 249).

A former stenographer from 1945 to 1949 said:

"At the time when she first worked for him, she had been employed as a clerk-typist and had had little experience in taking dictation. Mr. Green was patient and spent considerable time in teaching deponent. As a result of a reduction in force deponent was transferred out of the legal division.

In the four years that deponent worked with Mr. Green, he never used abusive or insulting language. He never said 'God damn it to Hell.' He acted courteously and with consideration. He never yelled at deponent. He never threw books about in a loss of temper. Deponent never heard him use the words, imbecile or ignoramus. When he called deponent to take dictation, he would say: 'Would you please.' Deponent never knocked on his desk to call his stenogra-

plier. He never said to deponent: 'You come here and you come fast.'" (J.A. 116).

This is the Chief Law Officer's version of the facts in these sworn statements:

> "The testimonies favorable to Mr. Green were submitted by his former secretary and a former co-worker who were acquainted with him during an entirely different period of time than that covered in Charge I. The witnesses who were associated with the appellant during the period covered by Charge I testified that his conduct toward office personnel was improper . . . . We cannot close our eyes to the indisputable evidence which establishes that his conduct was improper as charged." (J.A. 172).

It is to an employee's supervisor, who has a duty to know and to supervise, that one turns for information. The supervisor refused to execute an affidavit for petitioner. But when placed under oath by the Commission's investigator he affirmed the truth of the following statement in the affidavit he refused to execute (J.A. 10, No. 13,500):

> "Mr. Green never called deponent ignoramus or imbecile. Deponent knew that Mr. Green was making telephone calls with respect to the construction of his house and that he occasionally dictated a personal letter to his stenographer. The personal work was not extensive and did not interfere with Mr. Green's official work. The door between deponent's and Mr. Green's office was generally open. He never heard Mr. Green use abusive language to his stenographer . . . ." (J.A. 119).

This is the Chief Law Officer's view on this evidence:

> "As for the appellant's statement that he engaged in this personal work with the knowledge and approval of his supervisors, the evidence simply does not support him." (J.A. 178).

The first stenographer, after the talk with respondent, embellishes the words petitioner addressed to her:

> "When he discovered that I had not brought my stenographic notebook he then flew into a rage, pounding his fist on the desk, and shouted at me in harsh tones; 'Haven't I told you to bring your note book when I called for you. I don't want to have to tell you again.'" (J.A. 247).

Despite the characterization, the words after "harsh tones" establish that petitioner did not use abusive language.

The chief law officer excises these words and gives this truncated version:

> "With respect to the notebook incident, she said that he flew into a rage, pounded the desk with his fist and shouted at her in harsh tones." (J.A. 170).

He now finds that petitioner used abusive language by expressing incredulous disbelief in the words suppressed:

> "He states, however, that on this occasion he was not abusive but merely said to her, 'I don't want to have to tell you again to bring your notebook with you when I buzz.'" (J.A. 169).

In the process he puts words in petitioner's mouth.

The first stenographer in her affidavit attributed the following words to petitioner:

> "Please answer the phone in my name as you have been assigned to me." (J.A. 115).

After respondent spoke to her, this becomes:

> "On the first occasion, Mr. Green criticized me sharply when I answered the telephone in Mr. Coolidge's name." (J.A. 246).

The chief law officer alters this by truncation:

"In her affidavit to the Commission, Miss Smith stated that Mr. Green had criticized her sharply." (J.A. 170).

He, too, suggested resignation. Petition answered in a letter:

"This did not appear warranted by anything that I had said." (J.A. 152).

Petitioner asked the chief law officer to request the employees who had given statements to appear at the hearing, pointing out that the testimony of the supervisor and the second stenographer is "especially important to me." (J.A. 160). According to respondent they had stated that if called they would stand back of their statements.

A former chairman of the Commission had said:

"Furthermore, most of the witnesses in Section 14 proceedings are civil service employees and the Commission is in a position to require the testimony of such civil service employees. Whenever a veteran's representative in a Section 14 case requests that any civil service employee be a witness at the hearing, such a witness is required to come to the hearing and testify.

For these reasons the Commission does not believe that it should ask Congress to give it the power of subpoena in Section 14 cases." (J.A. 192).

Petitioner's request was denied on the ground that "the Commission had no subpoena power." (J.A. 29). Petitioner's supervisor said that he would have appeared if the Commission had requested his presence. (J.A. 29).

c. The Court Proceedings

Petitioner commenced an action in the District Court claiming that the charges were not stated specifically and in detail. He alleged that he had commenced the action prior to hearing in the Commission because the lack of

information and specificity of the charges prevented him from defending himself and disproving the charges. The District Court found that one of the charges, the use of abusive language, was specific and upheld the dismissal on that one charge. The Court of Appeals held that the administrative remedy had not been exhausted.

Petitioner exhausted the administrative remedy and commenced this action. Respondent filed no answer but made a motion for summary judgment contending that the administrative procedures complied with the statute and that bias and prejudice, bad faith and sham proceedings, arbitrary and capricious action, undue influence and coercion, were not grounds for setting aside the decision of dismissal of an administrative officer.

The District Court granted petitioner's motion upon the ground that the charges were not stated specifically and in detail. The Court of Appeals reversed, holding that the charges were specific and in detail and remanded for disposition of the remaining issues.

Respondents then changed the parties and issues. Respondent Laughman contended that he had not made the decision, that it had been made by the chairman. He introduced the by-laws of the corporate agency to show that he had no authority to make the decision. He had no authority. Under sec. 14 of the by-laws the chairman had authority to employ. The acting-chairman delegated that authority, including "separations for cause", to the President but limited it to employees in grade GS 12 and below. (J.A. 5, 7, No. 13,500). Petitioner was in grade GS 13.

As proof that the chairman had made the decision respondent introduced the affidavit of the chairman reciting the operations of his mind and claiming that it was his decision:

> "Based upon this study, I came to the independent conclusion that the charges were sustained and that Mr. Green should be discharged. I thereupon noted my

approval upon Mr. Baughman's memorandum and authorized and directed Mr. Baughman to notify Mr. Green by letter of my decision." (J.A. 2, No. 13,500).

The affidavit was introduced three and a half years after respondent had signed the decision of dismissal, one and a half years after his motion had been made. During this time he obtained judgments in the District Court and the Court of Appeals on the basis that he had made the decision. No permission was asked under F.R.C.P. 56(e) to submit a supplemental affidavit.

The chairman's affidavit merely recounts his action in approving respondent's recommendation, though it implies more. The Court of Appeals accepted the operations of the chairman's mind as evidence, quoting his "careful consideration" and "independent conclusion." It held that respondent, Baughman, did not dismiss petitioner because he lacked authority; that the chairman dismissed petitioner because he had authority and that he acted pursuant to the statute.

The Court of Appeals held that the chairman was an administrative officer of the agency, defining administrative officer as "administrative officer in respect to employment." The chairman's affidavit did not explain why he resorted to this singular and laborious method of making a decision when he could have signed the letter prepared by respondent.

Petitioner made the point that the frequent performance of acts, not criminal or immoral, openly in the office for twenty months while under supervision established as a matter of law the knowledge of the supervisor and the fact that the alleged acts were not considered offenses when performed. The lower court said:

> "The thrust of this point is that repeated offenses, accompanied by forbearance on the part of superior officers, or fear on the part of subordinates, or distaste on the part of either or both for disciplinary measures,

afford an immunity to the perpetrator. The fallacy of the position is evident in its statement."

The fallacy is secondary to this speculation in aid of a decision of dismissal. General counsel and respondent knew nothing of the offenses. Without knowledge there can be no forbearance or distaste. Nor can one speak of forbearance and distaste where an administrator on the statement of a girl of nineteen assumes the guilt of an attorney of many years at the Bar even before receiving his answer. Petitioner has no power or authority that would prevent a person from resenting the scorn and contempt in the words, "You come here and you come fast," repeated over sixteen months.

The court below is unmindful of the harrowing fear that would possess a stenographer, called on the carpet and put to the question by her administrative head because she had refused to endorse his charges. Our innate and traditional sense of fairness and decency protests against this abuse of power and authority.

The court below said:

> "The chief law officer specifically found no support for Green's allegation that his superiors were ignorant of the law, lacked ethics and were incompetent."

The record facts do not justify this statement. This, however, is incidental to the significance of the fact that the foregoing is alien to the matter in which it is set and irrelevant to the issues. The solicitude of the lower court for reputation is excited in favor of those who charge an employee with abusive language without knowledge of a word of abusive language, with calling his coworkers ignoramus and imbecile without the statement of a single coworker, with using three-fourths of the time of a stenographer over a period of sixteen months on personal work, a fantastic accusation; who cull from the probative evidence

available the statement of a girl of nineteen previously promoted by them, who put to the question an employee who would not sign a statement.

Surely a measure of this solicitude could be justly bestowed upon the victim of these practices, fighting for reputation and livelihood against those who hold and wield the power and authority of government.

REASONS FOR GRANTING THE WRIT

The writ should be granted for the following reasons:

(1) The Court of Appeals has departed from the accepted and usual course of judicial proceedings. Without definite parties and issues, justice is impossible. In an action against the administrative head of a corporate agency for wrongful dismissal, evidenced by a decision over his signature, the Court of Appeals ruled on the basis of a few words by the Chairman of the Board of the agency, introduced three and a half years after the commencement of the proceedings, that the chairman made the decision of dismissal.

The court affirmed a judgment on the merits, though the chairman is not a defendant subject to the jurisdiction of the court.

It is fundamental that a judgment on the merits can be made only if the person who committed the act claimed to be wrongful is a defendant; that accountability and liability evidenced by a writing over a signature cannot be altered by extrinsic or parole evidence; that the act of one without authority is void; that a signature is a representation of authority and accountability; that a defendant is estopped by a delay of three and a half years from introducing facts changing his position; that an employee and plaintiff is entitled to know the maker of the decision and the writings composing it. All these principles have been ignored by the court below. A departure from any one of them is fatal to a plaintiff's case.

(2) The administrative procedures sanctioned destroy the statutory safeguards in the Lloyd-LaFollette Act and the Veterans Preference Act, subjecting 2,300,000 employees to arbitrary discharge.

The statutes prescribe "reasons given in writing" for a dismissal. The decision of dismissal consisted of four words, "the charges are sustained," without reasons. This ruling conflicts with that of the Court of Claims on identical facts and with the uniform rulings of the lower court.

The statute and regulations prescribe charges "specifically and in detail." The charges alleged unascertainable quantities of offenses without dates, details, or names, composed substantially of characterization.

The statute and regulations provide that the decision shall be based on the information in the charges. The administrative judge based his action on written statements and conversations with employees, held after petitioner had submitted his answer, using the charges as allegations to be proved.

The statute provides for a decision by an administrative officer. The administrative officer made a recommendation for the decision of the chairman and when it was approved, signed the written decision.

(3) The reputation and right to work of an attorney of many years at the Bar is involved. The Court of Appeals has upheld a dismissal that deprives an attorney of more than thirty years at the Bar of reputation and means of livelihood, now and in the future, on the uncorroborated statement of a girl of nineteen who had never complained of a single offense over the entire period of sixteen months prior to her promotion by the administrative head.

(4) The facts are undenied. The issue is whether arbitrary and capricious action, bias and prejudice, bad faith and sham proceedings, coercion and undue influence, constitute grounds for invalidating an administrative decision of dismissal. The Court of Appeals and the Court of

Claims are in direct conflict. The issue is presented for the first time to this court. It is one of great importance to all government employees. Upon its decision depends the substance and reality of the safeguards in the statutes.

ARGUMENT

I

THE LOWER COURT'S JUDGMENT ON THE MERITS IS IMPROPER AND INVALID IN THE ABSENCE OF THE CHAIRMAN AS A DEFENDANT.

The court below held that the chairman made the decision of dismissal. Petitioner assumes for the moment that this ruling was correct. A court may not proceed to a consideration of the merits if the person who committed the act, claimed to be wrongful, is not a defendant, subject to the jurisdiction of the court.

Blackmar v. *Guerre*, 342 U.S. 512
Williams v. *Fanning*, 332 U.S. 490, 493
Webster v. *Fall*, 266 U.S. 507, 510
Gnerich v. *Rutter*, 265 U.S. 388, 393

II

THE DECISION OF DISMISSAL, SIGNED BY RESPONDENT, BAUGHMAN, IS VOID BECAUSE OF RESPONDENT'S LACK OF AUTHORITY AND JURISDICTION.

A signature without qualification is a representation of responsibility and accountability. Respondent was the "chief executive officer" empowered to "carry out or direct the business and affairs of the Association." (J.A. 5, No. 13,500). He was named in the charges to receive the evidence. He lacked authority to discharge petitioner in grade GS 13. (J.A. 5, No. 13,500). His purported decision is therefore void. *Peters* v. *Hobby*, 349 U.S. 331, 340.

The court below has held that a defendant, sued for a wrongful dismissal evidenced by a decision over his signature, can introduce parole or extrinsic evidence to show that another was accountable for the decision. In *Nash*

v. *Towne*, 72 U.S. 689, 703, 704; the court held that parole or extrinsic evidence can never be introduced to show that a person who purported to act as principal was an agent.

The decision of the court below destroys the statutory safeguards of 2,300,000 employees, veteran and non-veteran. The Lloyd LaFollette Act and the Veterans Preference Act apply to demotions, suspensions, furloughs without pay and reductions in rank or pay. The court's ruling means that the signature does not indicate the maker of the decision, that an employee can be kept in the dark, in this case for three and a half years, as to the identity of the maker of the decision and the writings composing it. The Court discusses three writings. Petitioner received but one. Without definite knowledge of the maker and the writings, an employee cannot show that the maker was biased, was not an administrative officer, or had not followed the statutory procedures. He does not know whom to name in an action as a defendant.

In this age when the existence of the nation may hang on the prompt execution of commands meaning life or death to millions, a subordinate would indeed be in a quandary if he could not rely upon the signature to an order. An attorney could not advise his client. He would not know when a court would substitute a stranger for a defendant upon some verbal; self-serving declaration.

In sum the Court of Appeals has denied to a signature its meaning and consequences. It has accepted the operations of the mind,—independent conclusion, careful consideration, my decision,—to contradict an official, signed, writing, prescribed by statute. It has accepted evidence upon a review though the administrative proceedings have long been closed. It has accepted an affidavit as evidence, though it contained not a single fact, "admissible in evidence." (F.R.C.P. 56e). It has held that employees can be kept in ignorance of the maker of a decision and the writings constituting it, depriving them of the safeguards of the statutes.

Petitioner submits that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" and "so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Rule 19).

III

RESPONDENTS HAVE WAIVED THE OBJECTION OR DEFENSE THAT RESPONDENT, BAUGHMAN, DID NOT MAKE THE DECISION AND ARE FURTHER ESTOPPED BY THREE AND A HALF YEARS OF SILENCE AND ACTION FROM ALLEGING THE FACTS NOW.

The objection or defense that respondent, Baughman, did not make the decision is waived unless presented within the time allowed in Rule 12, F.R.C.P. Defendants have a sure means of defeating claims if they can keep plaintiffs in ignorance of defenses for three and a half years. Defenses can then be concocted, for the evidence of their concoction is obliterated by time.

Respondents are further estopped by their admissions and actions over a period of three and a half years. The allegations in the complaint stand admitted. Among these is the allegation that "on Sept. 19, 1952, a decision, signed by the defendant, Baughman, was rendered, dismissing plaintiff." (J.A. 2). Respondents made motions and obtained judgments upon the grounds that petitioner had not exhausted the administrative remedy and that the charges were specific. They were entitled to make these motions and receive the relief granted only if respondent, Baughman, had made the decision. If he had not, he was not legally interested in the facts, issues or the relief requested in his motions. Respondents have put petitioner to great expense. They have had the benefits of the judgments obtained by them and now would repudiate the fact, without which they could not have obtained the judgments.

Their contention would relegate petitioner to an action against the chairman. Respondent's delay spells certain defeat for petitioner in an action against the chairman.

No litigant can hope to gather evidence to make good a claim against a person whose identity is first disclosed after the lapse of three and a half years.

In *Davis* v. *Wakelee*, 156 U.S. 680, 689, the court said:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

IV

THE HOLDING OF THE COURT BELOW THAT AN ADMINISTRATIVE DECISION OF DISMISSAL, "THE CHARGES ARE SUSTAINED," IS A COMPLIANCE WITH THE STATUTORY SAFEGUARD REQUIRING REASONS IN WRITING CONFLICTS WITH THE UNIFORM DECISIONS OF THE COURT OF CLAIMS AND THE COURT BELOW AND SUBJECTS 2,300,000 EMPLOYEES TO ARBITRARY DISCHARGE.

The Veterans Preference Act enjoins in its opening words that "no preference eligible . . . shall be discharged, suspended . . . , furloughed . . . , reduced in rank or compensation, or debarred for future appointment except . . . for reasons given in writing." The Lloyd-LaFollette Act, also in its first words, enjoins that "no person in the classified service . . . shall be removed . . . or suspended . . . except for . . . reasons given in writing." The regulations, 5 CFR, sec. 9.102(1), prescribe that "the employee shall be furnished at the earliest practical date with a written decision" and "shall be notified in the decision of the reasons for the action taken and its effective date."

The Court of Claims in *Blackmar* v. *U.S.*, 120 F. Supp. 408, held that a decision in identical language, "The charges against Mr. Blackmar are sustained," was not a compliance with the procedural requirements of the Veterans Preference Act.

The court below has uniformly held that the statute requires reasons specifically identified with the charges. In *Mulligan* v. *Andrews*, 211 F. 2d 28, 30, the lower court said:

> "Plainly, and we so hold, the requirement of 'reasons' for removal is not satisfied in this case by the conclusion of 'unsuitability' based upon vague references to appellant's answer and 'facts developed during the investigation.' The decision failed to disclose which of the charges contained in the notice of proposed adverse decision were relied upon for removal . . . Under the provisions of the statute and of the regulations, outlined above, only findings upon such charges, *specifically identified*, can constitute the 'reasons' required in the adverse decision." (Emphasis supplied)

In *Kutcher* v. *Higley*, 235 F. 2d 505, 509, the lower court said:

> "Since only findings on the charges, specifically identified, can constitute reasons for removal, a reading of the charges must demonstrate the reasons for dismissal, assuming all the charges are sustained."

In *Both* v. *Brownell*, 215 F. 2d 500, 502, cert. den. 348 U.S. 863, the lower court held that no formula "can obviate the requirement of the Lloyd LaFollette Act that 'No person in the classified civil service shall be removed . . . therefrom without notice and reasons given in writing."

The phrase, the charges are sustained, is a formula. A rubber stamp with these words can end the career of an employee of long standing. Specific findings compel a scrutiny of the evidence. A blanket decision requires none. The formula invites haste and indolence, offers a cover for bias.

The lower court has demonstrated its error by setting forth the findings which it has held need not be stated. Summarizing the charges and evidence, it says:

> "When such charges are sustained, surely no more potent reasons for discharge for the good of the government can be assigned."

The court has supplied the reasons. In the process it has forgotten that the issue is whether the procedural safeguards in the statute have been observed. The statute must be observed even if the reasons for discharge are potent.

It is not the function of a court upon review to "spell out" findings. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510. In *Wichita R.R.* v. *Pub. Util. Comm.*, 260 U.S. 48, 59, the court, speaking through Chief Justice Taft, said:

> "It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.
>
> It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this . . . We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statute of the State."

The decision of the lower court lays the basis for the reintroduction of the practice of discharge for bias or politics and exposes government employees to discharge without reason. Its decision is in conflict with its uniform decisions in the past and with a decision of the Court of Claims, establishing the law in that court.

V

THE CHARGES ARE NOT STATED SPECIFICALLY AND IN DETAIL AND CONTAIN NO INFORMATION THAT CAN BE ANSWERED.

The Veterans Preference Act requires that the employee be given a written notice "stating any and all reasons, specifically and in detail." The regulation, 5 CFR, sec. 9.102(1), requires that "the notice shall set forth, specifically and in detail the charges preferred against him." The right to answer presumes charges that can be answered.

Blanket charges, accusing en masse, charges of alleged discourteous remarks without date or context to identify them, charges accusing of a personal use of the stenographer for three-quarters of her time for sixteen months without a statement of the personal work, are impossible of answer.

In *Blackmar* v. *U.S.*, 120 F. Supp. 408, 414 (Ct. Cls.), the charges consisted of allegations of "numerous" offenses, "frequently" and "repeatedly" committed over a period of time. The court said:

> "There would seem to be no great difficulty in specifying such alleged derelictions and such detailed information was doubtless in the agency's possession at the time, since it now urges that its awareness of these facts prompted the dismissal action . . .
>
> It will be noted that no instances are cited, no dates (not even approximate ones) given . . . It would be difficult for the veteran to join issue with the agency on such a charge unless he was prepared to prove several broad negatives."

In *Deak* v. *Pace*, 185 F. 2d 997, 999, a case involving security, the court below held that "the information must be sufficient to inform the employee with reasonable certainty and precision," that employees must be "informed of the dates, places and organizations referred to." Otherwise their right to answer is limited to a general denial.

In *Money* v. *Anderson*, 208 F. 2d 34, 38, the lower court held that names and dates must be stated in the charges.

Blanket charges of indefinite quantities of offenses and charges consisting of characterization are flexible. In *Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 176, Mr. Justice Douglas said:

> "The charge is flexible; it will mean one thing to one officer, another to some one else. It will be given meaning according to the predilections of the prosecutor . . . These flexible standards, which vary with the mood or political philosophy of the prosecutor, are weapons which can be made as sharp or as blunt as the occasion requires. Since they are subject to grave abuse, they have no place in our system of law."

The administrative judge may not base his determination on information outside the charges. The charges are not allegations to be proved by evidence. If the specific information is not in the charges, the employee has no means of acquiring it afterwards. The respondent relied upon the statements of the employees and personal interviews with the employees after petitioner answered. (J.A. 203, 256). The charges were bare allegations to be proved by information outside the charges, as the following extract from respondent's resume of the evidence shows:

> "CHARGE I. IMPROPER CONDUCT TOWARD OFFICE PERSONNEL
>
> (a). It is charged that Mr. Green used improper conduct toward officer personnel . . . It will be seen from Mrs. Smith's unsigned statement that he used severe language toward her about answering the telephone for the other lawyer who at that time shared the office with Mr. Green. . . . The secretary was correct in saying 'Mr. Coolidge's office when she answered the telephone, and, further there was no need for severeness." (J.A. 257).

Interviewing employees upon the issues after answer is a dangerous abuse. The information imparted in such conversations may be rumors of immoral or criminal conduct, of disloyalty. S1-28 of the Federal Personnel Manual of the Commission provides:

> "A decision adverse to the employee must be based only on the reasons given in the notice which he had an opportunity to answer. No other reasons are valid as a basis for the adverse decision."

There is no way of knowing the reasons that influenced the judge when he wanders afield collecting information. It is no answer that all the information was placed in the Commission's appeal file and made available for inspection. Information after decision is futile. The statute requires information before answer. In *Deak* v. *Pace, supra,* p. 1000, the court below said:

> "Nor do we think that information given in cross-examination at the hearing can serve as a substitute for the full information required by the statute to be given thirty days before the prescribed time for submitting defensive statements and affidavits."

The court below has sanctioned procedures that deprive the employee of the right to know the charges and to answer.

VI

THE CHAIRMAN WAS NOT AN ADMINISTRATIVE OFFICER OF THE AGENCY.

Under the Veterans Preference Act the decision must be made by "the administrative officer so acting." This leaves the initial determination in the operating head who would be expected to know more about the character and actions of the employee than a person with no administrative duties. *Peters* v. *Hobby*, 349 U.S. 331, 345.

Under sec. 19 of the by-laws respondent was the operating head:

"The President shall be the chief executive officer of the Association and shall carry out or direct the business and affairs of the Association, subject to the general supervision of the Chairman . . ." (J.A. 5, No. 13,500).

The lower court's definition of administrative officer to mean "administrative officer in respect to employment" does violence to the plain meaning of plain language.

VII

THE PROCEDURE OF RECOMMENDATION AND DECISION VIOLATES THE STATUTE.

The Veterans Preference Act provides for a decision. It centers responsibility in one person. He must exercise his "own independent discretion." *Accardi* v. *Shaughnessy*, 347 U.S. 260, 268; *Morgan* v. *U.S.*, 298 U.S. 468.

The statute prescribes procedures to be followed by the administrative officer. The procedure of recommendation destroys the safeguards of the statute. A recommendation can be made on bias, rumor or information known only to the recommender. A recommender need not be an administrative officer or qualified to judge. Through the procedure here adopted the statutory safeguards are evaded.

VIII

ARBITRARY AND CAPRICIOUS ACTION, BAD FAITH AND SHAM PROCEEDINGS, BIAS AND PREJUDICE, COERCION AND UNDUE INFLUENCE, CONSTITUTE GROUNDS FOR SETTING ASIDE AN ADMINISTRATIVE DECISION OF DISMISSAL.

Respondents have taken the position that the admitted facts do not constitute grounds for setting aside an administrative decision of dismissal, that courts will intervene only because of a procedural defect. The court below gave attention to the facts "merely because of his persistent affirmation of arbitrary and capricious actions."

There is authority in its decisions, cited by the lower court, for the position taken by respondents. In *Bailey* v. *Richardson*, 182 F. 2d 46, 64, aff'd in 341 U.S. 918, and *Levy* v. *Woods*, 171 F. 2d 145, 146, the lower court, quoting from *Golding* v. *United States*, 78 C. Cls. 682, 685, cert. den. 292 U.S. 643, said:

> "The allegations that plaintiff was innocent of the charges preferred against him * * * and that the investigation which resulted in his removal was biased, prejudiced, and unfair, are immaterial."

In *Knott* v. *U.S.*, 121 F. Supp. 630, *Levy* v. *U.S.*, 118 C. Cls. 106, 111, and *Gadsden* v. *U.S.*, 78 F. Supp. 126, 127, the Court of Claims held that arbitrary and capricious action, bias and unfairness, invalidate the dismissal. The Court of Claims overruled the *Golding* case in *Levy* v. *U. S.*, *supra*.

Both courts claim support for their views in the decisions of this court. In *Gadsden* v. *U.S.*, *supra*, p. 128, the Court of Claims said:

> "Both this court and the Supreme Court have many times held that if the decision is arbitrary or capricious or so grossly erroneous as to imply bad faith it will be set aside."

The court below cites *Keim* v. *U.S.*, 177 U.S. 290, and *Eberlein* v. *U.S.*, 257 U.S. 82. The latter case is cited by the Court of Claims in the *Blackmar* case, *supra*, at p. 413 for its view. Confusion is added in *Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 185, where Mr. Justice Jackson cited the *Golding* case for the proposition that court will not review discretionary action in ordinary dismissals although "the officer taking the action is alleged to have acted in a biased, prejudicial and unfair manner."

This issue is presented to this court for the first time. Neither *Keim* v. *U.S.* nor *Eberlein* v. *U.S.* hold that a decision can be based on bias but assume the exercise of an

honest judgment. Further, these cases were based on lower court decisions before the enactment of the Lloyd-LaFollette Act and the Veterans Preference Act. The statutory safeguards are a phantom if bias can be exercised.

We live in an age of inexorable, unforgiving, records that pursue through the future. A dismissal on charges may write finis to government employment. But it is the beginning for the employee, the beginning of anxiety and want, of a struggle for survival.

An attorney's position is one of trust and confidence. No one will employ an attorney dismissed on charges. It becomes vital, then, that these records that bid fair to dominate our lives reflect the truth so far as humanly possible. When the record is an administrative judgment that is challenged in court, petitioner submits that it is the function of the court to determine whether the administrative judgment is based on bias and bad faith. Petitioner believes that this court grants no immunity to bias, that it knows only one kind of judgment.

Petitioner offers the following from the Commonweal of May 25, 1956, p. 193 as more in keeping with our practice, ideals, and opinion to-day:

> "It seems to us that a man does have certain specific rights in this matter of employment. In the case of a government job, he has a right to fair and equal treatment . . . If the man is discharged arbitrarily or on very flimsy reasons, that action cannot be dismissed lightly. In very much the same way, a man in private employment has comparable rights, rights recognized in most industries. If he is dismissed without adequate cause, we again do not see how the action can be brushed aside on the ground that he has no right to that specific job. Somewhere, sometime in this matter of employment, a man's right to life and the means to sustain it has to become specific."

CONCLUSION

The court deals here with petitioner's reputation and right to work. The position from which he has been deprived is vital to him, now that his disabilities have narrowed his opportunities. Petitioner prays that his petition for a writ of certiorari be granted.

A. Lincoln Green,
Petitioner, pro se,
1305 Key Drive,
Alexandria, Va.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12717

J. STANLEY BAUGHMAN, President; Federal National Mortgage Association, et al., *Appellants*,

v.

A. LINCOLN GREEN, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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Decided January 12, 1956

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Burger* and *Mr. Leo A. Rover*, United States Attorney, were on the brief, for appellants. *Messrs. Lewis Carroll* and *Samuel J. L'Hommedieu, Jr.*, Assistant United States Attorneys, also entered appearances for appellants.

Mr. A. Lincoln Green, appellee, *pro se*.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

PER CURIAM: This case is a sequel to *Green* v. *Baughman*, 94 U.S. App. D.C. 291, 214 F.2d 878 (1954). After our decision there, Mr. Green pursued his administrative remedy before the Civil Service Commission. The Commission, after hearing testimony, finally ruled that "Charges 1(a), 1(b), 2 and 3, as set forth in the notice of proposed adverse action [the Statement of Charges] are procedurally valid and that the removal action was justi-

fied and was for such cause as will promote the efficiency of the Service within the meaning of Section 14 of the Veterans' Preference Act of 1944, as amended, on the basis of these charges."[1]

After this decision of the Commission, Mr. Green filed an action in the District Court, seeking a declaratory judgment that his dismissal was illegal, as well as an order reinstating him in his Government post. On cross-motions for summary judgment, the District Court denied the Government's motion and granted summary judgment to Mr. Green. The court held each and all of the charges made against Mr. Green to be insufficient to meet the requirement of the Veterans' Preference Act that reasons for discharge must be stated "specifically and in detail." 5 U.S.C. § 863 (1952).

With deference, we are constrained to disagree with this ruling of the court. Charges 1(a), 1(b), 2 and 3, on which the Commission relied, appear to us to give the appellee sufficient information of the charges against him to afford him "a fair chance to defend himself. It is this consideration which must be controlling and not necessarily the standards of a criminal indictment." *Blackmar* v. *United States*, 128 Ct. Cl. 693, 703, 120 F. Supp. 408, 413 (1954). The charges here were lengthy and detailed: so lengthy, in fact, that we do not feel justified in burdening this opinion by reproducing them. The matters set forth are adequately identified as to time, place and persons. *Cf. Deak* v. *Pace*, 88 U.S. App. D.C. 50 at 52, 185 F.2d 997 at

[1] The Commission also determined that "Charges 4 and 5 are defective due to lack of specificity required by Section 14 of the Act and the Commission's Regulations." This determination, of course, does not of itself vitiate the Commission's decision that removal on the remaining charges was proper. Deviny v. Campbell, 90 U.S. App. D.C. 171 at 174, 194 F.2d 876 at 879, cert. denied, 344 U.S. 826 (1952). See also Williams v. Cravens, 93 U.S. App. D.C. 380, 381, 210 F.2d 874, 875, cert denied *sub nom.* Williams v. Robbins, 348 U.S. 819 (1954).

999 (1950); *Mulligan* v. *Andrews*, 93 U.S. App. D.C. 375, 211 F.2d 28 (1954). Appellee's reply was also lengthy and detailed: though he complained of the vagueness of the charges, he clearly understood them and at great length endeavored to rebut them. *Cf. Williams* v. *Cravens*, *supra* note 1.

For these reasons we conclude that the District Court erred in granting appellee's motion for summary judgment, and the judgment entered must be reversed. The Government urges that the cause be remanded with instructions to grant the Government's cross-motion for summary judgment. That motion raises issues not connected with the matter of specificity, which we think should first be considered by the District Court. The judgment entered will be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13500

A. LINCOLN GREEN, *Appellant*

v.

J. STANLEY BAUGHMAN, President, Federal National Mortgage Association, et al., *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided January 31, 1957

Mr. A. Lincoln Green, appellant, *pro se*.

Mr. William P. Arnold, Attorney, Department of Justice, with whom Assistant Attorney General *George Cochran Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellees.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

PRETTYMAN, *Circuit Judge*: This controversy is here for the third time. Upon the first appeal we held[1] that Green had not exhausted his administrative remedies. Upon the second appeal we held[2] that the charges upon which the dismissal rested were sufficiently specific. The

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[1] Green v. Baughman, 94 U.S. App. D.C. 291, 214 F.2d 878 (1954).

[2] Baughman v. Green, 97 U.S. App. D.C. 150, 229 F.2d 33 (1956).

present appeal is from a summary judgment granted appellees Baughman, *et al.*, by the District Court.

Green was an attorney with the Federal National Mortgage Association, a corporate agency of the United States. He was a veteran preference eligible. In July, 1952, he was served with a statement of charges and a notice of proposed discharge. He replied at length. The charges were sustained by the head of the agency, and Green's discharge was ordered. He appealed to the Civil Service Commission. A hearing was held there, and the discharge was sustained by the hearing officer. Appeal was taken to the Board of Appeals and Review, and that tribunal affirmed. More of the facts need not now be stated, in view of the statements in our opinions upon the prior appeals.

Green filed a civil action seeking declaratory judgment that his dismissal was illegal, as in violation of the Veterans' Preference Act[3] and the regulations of the Civil Service Commission, and for an order directing restoration to his position as of the date of his discharge.

Green makes twelve points. His first point is that his discharge by Baughman, President of the Association, was without authority and therefore null. But the record shows that the discharge was approved and directed by the Chairman of the Board of the Association after "careful consideration" and as an "independant conclusion". Green admits this latter official had the authority.

The second point is that the decision in the letter of notification stated no reasons, simply saying "that the charges are sustained". The statute provides[4] that no preference eligible shall be discharged except for reasons given in writing. The charges were stated in writing and

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[3] 58 STAT. 387 (1944), as amended, 5 U.S.C.A. § 851 *et seq.*

[4] 58 STAT. 390 (1944), as amended, 5 U.S.C.A. § 863.

with sufficient specificity. They were sustained, and Green was so notified in writing. We think direct reference to the charges as sustained was a sufficient statement of the reasons for the discharge.

The third point is that Green was entitled to a decision, not a mere recommendation, by Baughman. This point appears to be at variance with the first point, *supra;* but, however that may be, the record shows that Baughman made a recommendation, based upon long and detailed findings, to the Chairman of the Board, who had the authority to order discharge and who approved Baughman's recommendation, as we have said. This agency was a corporate entity. Its bylaws (Article 14) provided that the Chairman of the Board "may select, employ * * * such * * * employees * * * as shall be necessary for the transaction of the business of the Association". Thus he was the administrative officer in respect to employment. The decision to which Green was entitled under the Civil Service Manual (the statute is silent on the subject) was a decision by the Chairman. He received such a decision. Green relies upon our decision in *Kutcher* v. *Gray*,[5] but in that case there was no decision by the responsible official upon the crucial point there at issue.

Green's fourth point is that Baughman considered oral and written statements which he (Green) was given no opportunity to answer. Green was given the charges, which we have held to have been sufficiently specific.[6] He replied at length. Upon his appeal to the Civil Service Commission he was given a hearing, at which he appeared. Testimony was taken. The record shows that all the information secured during the investigation and all memoranda and correspondence in connection with the case were placed in the Commission's appeal file and made

[5] 91 U.S. App. D.C. 266, 199 F. 2d 783 (1952).

[6] *Supra* note 2.

available for inspection by all parties. The statutes require only that charges and reasons be given an employee proposed for discharge.[7] We think Green has no basis for the complaint advanced on this point.

The fifth point is that the dismissal was arbitrary, unreasonable and capricious. We have examined the record with some care and find no ground for that assertion.

The sixth, seventh and eighth points are that Baughman was biased, prejudiced, interested, and motivated by bad faith. We find no basis in the record for these assertions.

The ninth point is that the frequent performance of acts not *per se* criminal or immoral, openly in an office for twenty months, while under supervision and observation, establishes as a matter of law that the alleged acts were not offenses. The thrust of this point is that repeated offenses, accompanied by forebearance on the part of superior officers, or fear on the part of subordinates, or distaste on the part of either or both for disciplinary measures, affords immunity to the perpetrator. The fallacy of the position is evident in its statement.

Point ten is that the stenographers who filed statements against Green were subjected to coercion, duress, and undue influence. We find no evidence to that effect.

Point eleven is that the Chief Law Officer of the Civil Service Commission failed to decide the issue of the bias and interest of Baughman. The Chief Law Officer specifically found no support for Green's allegations that his superiors were ignorant of the law, lacked ethics, and were incompetent, and that Officer specifically found that the personnel action of the Association was not arbitrary, unreasonable or capricious. Moreover, as we have pointed out, Baughman was not the ultimate authority in the

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[7] Lloyd-La Follette Act, 37 Stat. 539 (1912), as amended, 5 U.S.C.A. § 652(a); Veterans' Preference Act, *supra* note 4.

Association, and no charge of bias against the Chairman was made.

The twelfth and final point is that the Chief Law Officer of the Commission abused his discretion in failing to ask Government employees to appear at the hearing. We passed on this matter in *Deving* v. *Campbell*.[8]

We have commented upon all of appellant's points merely because of his persistent affirmations of arbitrary and capricious actions on the part of the officials dealing with his case and because some of the points suggest procedural infirmities. It is settled beyond peradventure of doubt that courts will not examine into the merits of the discharges of employees in the executive branch of the Government.[9] All procedural requirements were fully met in the present case. The record contains long findings of fact by Baughman (seventeen printed pages) when he recommended the discharge and by the Chief Law Officer of the Civil Service Commission (twenty-three printed pages) when he made his recommendation upon the appeal. Green insists his discharge was arbitrary and capricious. The charges against him, and the evidence, fall into two main parts: (1) that he was unbearably

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[8] 90 U.S. App. D.C. 171, 174, 194 F.2d 876, 879 (1952), *cert. denied*, 344 U.S. 826, 97 L. Ed. 643, 73 S. Ct. 27 (1952).

[9] Eberlein v. United States, 257 U.S. 82, 66 L. Ed. 140, 42 S. Ct. 12 (1921); Keim v. United States, 177 U.S. 290, 44 L. Ed. 774, 20 S. Ct. 574 (1900); Keyton v. Anderson, 97 U.S. App. D.C. 178, 229 F.2d 519 (D.C. Cir. 1956); Benenati v. Young, 95 U.S. App. D.C. 120, 220 F.2d 383 (D.C. Cir. 1955); Williams v. Cravens, 93 U.S. App. D.C. 380, 210 F.2d 874 (D.C. Cir. 1954), *cert. denied* 348 U.S. 819, 99 L. Ed. 646, 75 S. Ct. 30 (1954); Blackmon v. Lee, 92 U.S. App. D.C. 268, 205 F.2d 13 (D.C. Cir. 1953); Powell v. Brannan, 91 U.S. App. D.C. 16, 196 F.2d 871 (D.C. Cir. 1952); Carter v. Forrestal, 85 U.S. App. D.C. 53, 175 F.2d 364 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 832, 94 L. Ed. 507, 70 S. Ct. 47 (1949); Levy v. Woods, 84 U.S. App. D.C. 138, 171 F.2d 145 (D.C. Cir. 1948).

discourteous to and inconsiderate of subordinates and co-workers, yelling and using toward stenographers such expressions as "You come over here and you come fast" and "God damn it to hell, why can't you do things right" and toward co-workers such terms as "ignoramus" and "imbecile"; and (2) that he used Government office, property and personnel in notable quantities for personal business and affairs, causing delay and postponement of official work. When such charges are sustained, surely no more potent reasons for discharge for the good of the Government service can be assigned. It is essential to the good of such service that employees devote Government time to Government service and that superiors at all levels operate with a decent regard to at least the rudiments of accepted manners toward subordinates.

Affirmed.

Sec. 14, Veterans Preference Act as amended, 5 U.S.C., sec. 863:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating

any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .

Lloyd-LaFollette Act, 5 U.S.C., sec. 652(a):

No person in the classified service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any

trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission."

Regulations of the Civil Service Commission:

5 CFR, sec. 9102 (1), as amended in 15 Fed. Reg. 3075:

No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made

a part of the records of the department or agency concerned."

5 CFR, sec. 22.3, as amended in 18 Fed. Reg. 8227:

Notification of adverse decision of administrative officers of agencies.

Adverse decision by administrative officers following notification of proposed adverse action, charges and opportunity for answer shall be in writing, dated, and submitted to the employee promptly after such decisions have been made. The employee shall also be advised in the same notification, of his right to appeal to the appropriate office of the Civil Service Commission, as provided in Sec. 22.4.

S1-28, Federal Personnel Manual of the Civil Service Commission (extract):

A decision adverse to the employee must be based only on the reasons given in the notice which he had an opportunity to answer. No other reasons are valid as a basis for the adverse decision.